No. 12,678

IN THE

United States Court of Appeals

For the Ninth Circuit

FEDERAL SERVICES FINANCE CORPORATION, a Corporation,
Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, a Corporation,
Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction of the court below was based on diversity of citizenship in conformity with *Title 28 U.S.C.* Sec. 1332. The jurisdiction of this court on appeal rests in *Title 28 U.S.C.* Secs. 41, 1291, 1294.

STATEMENT OF FACTS.

The appellant corporation drew certain checks on the appellee bank payable to the order of the Waipahu Auto Exchange, Ltd., during the months of January

through May, 1949. One of the checks was endorsed, "Waipahu Auto Ex. Ltd. by Anthony Yee, President", cashed by the appellant at its office, and deposited to the appellant's account with the appellee (Deft. Ex. 2) (R. 71, 72). The other checks, the payment of which is in dispute in this case, were endorsed in identically or substantially the same manner and cashed by the appellee (Plff. Exs. B-1-B-12).

Cancelled checks in dispute were returned to the appellant each month with a bank statement which contained the inscription "* * * If you do not so notify us within thirty days from this date you will be deemed to have accepted the statement as correct and the vouchers and checks as genuine." (R. 23). The appellant never notified the bank of any irregularities until after the period in dispute, and admits it did not examine the endorsements on the checks until after defalcations of Yee were discovered (R. 78-80).

It is alleged by the appellant in its complaint and in its amended complaint that Anthony Yee wrongfully and without authority endorsed the checks with the name of the payee (R. 4-16). In appellant's opening statement, it was stated, "We will show that Anthony Yee, president, was not authorized to endorse and receive cash for these checks." (R. 35, 36).

By way of proof, Takeshi Yokono, treasurer of the Waipahu Auto Exchange, Ltd. (hereinafter called the payee corporation), was called to the stand by the appellant to identify what purported to be by-laws of the payee corporation. The apparent purpose of this testimony and of the exhibit was to establish the

lack of authority of the president to endorse and cash checks of the payee corporation. The offer in evidence of the purported by-laws was rejected because of a failure to show adoption in compliance with the corporate statutes of the Territory of Hawaii. The president of the payee corporation handled all dealings with finance companies and largely managed and controlled this most informally organized and irregularly conducted corporation (R. 160, 161 *et passim*).

A more detailed statement of those facts pertinent to the various points to be hereinafter discussed will be set out under such discussions.

QUESTIONS INVOLVED.

1. Did the trial court err in excluding the purported by-laws of the payee corporation from evidence, and, if so, is such error material?

2. Did the trial court err in permitting the scope of cross-examination of Takeshi Yokono, the treasurer of the payee corporation, to the extent allowed, and, if so, is such error material?

3. Are the findings of fact of the trial court so clearly erroneous as to require a setting aside on appeal?

SUMMARY OF ARGUMENT.

The trial court corectly ruled that the purported by-laws of the payee corporation were not admissible in evidence. Not having been adopted either in strict or substantial compliance with the statute, the purported by-laws were defective and invalid under territorial law. Even if this ruling were erroneous, there was no prejudice to the appellant, for the evidence clearly showed a course of corporate conduct and conduct on the part of the president and the other directors which operated to nullify any express limitation on the authority of the president.

The trial court was not in error in permitting cross-examination of Takeshi Yokono, the treasurer of the payee corporation, to the extent allowed. The direct testimony was offered to show that the president of the corporation had no authority to endorse and cash checks on which the corporation was payee, and also to show that the corporation acted as though the so-called by-laws were in force. The cross-examination was directed to the circumstances which showed authority in the president of the corporation. Under the federal rule, the right of cross-examination is not confined to the specific questions asked on direct examination but extends to the full scope of the subject matter of the examination-in-chief. The discretion allowed to the trial judge in this matter is not shown to have been abused.

The trial court found from the evidence that the appellee bank made payment to an authorized officer of the payee, and, on such finding, properly rendered

judgment for the defendant. These findings are not so clearly erroneous within the meaning of Sec. 52 (a) of the Federal Rules of Civil Procedure as to require a reversal on appeal.

ARGUMENT.

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT IN EVIDENCE THE PURPORTED BY-LAWS OF THE PAYEE CORPORATION.

The appellant, to establish the allegations of its complaint that "Anthony Yee [the president of the payee corporation] took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein," (R. 16) and, in support of its opening statement that it would show that Yee was not authorized to endorse and receive cash for these checks (R. 35, 36), offered in evidence what purported to be the by-laws of the payee corporation.

It appearing that no meeting was held of all the incorporators or of the stockholders in the manner required by territorial law (*R.L.H. 1945,* Sec. 8335), the trial court denied the offer in evidence (R. 136). The appellant assigned this ruling as error (R. 201) (Appellant's Brief, pp. 26-31).

In challenging the ruling of the trial court before this court, the appellant is controlled by the principle stated by Mr. Justice Douglas in *Palmer v. Hoffman,* 318 U.S. 109, 116; 87 L.ed. 645, 651 (1942):

> "* * * He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. * * *"

Also to the same effect, *United States v. Crescent Amusement Company,* 323 U.S. 173, 79 L.ed. 160 (1944).

This burden the appellant fails to assume, it merely being stated in the opening brief that "this ruling constituted reversible error in the face of the foregoing facts" (Appellant's Brief, p. 31). It is submitted that the "foregoing facts" spell out no showing of prejudice, and for this reason, if for no other, the trial court is to be upheld in its ruling.

But beyond that, the evidence clearly shows that there was actually no prejudice to the appellant in the ruling denying the admission of the purported by-laws. The purpose of the offer was to prove that the president had no authority to endorse and receive cash for checks on which the corporation was named as payee. This contention would appear to be supported by that portion of Section 1 of Article V of the rejected document (R. 118) which states that "* * * Except as otherwise provided by these by-laws or by law, all checks * * * shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; * * *"

However, that section also contains a proviso reading: "* * * the Board of Directors may from time to time by resolution authorize checks, * * * endorsements, * * * or writings of any nature to be signed, executed and delivered by such officers, agents or em-

ployees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors." (R. 118). The so-called by-laws also provide that "The President * * * shall exercise general supervision over the business of the corporation and over its several officers, agents and employees, * * *" (R. 116).

The evidence shows a course of conduct by the directors and officers whereby all transactions involving financial corporations were turned over to the president (R. 97-100, 161, 162). It shows that the treasurer consented to the president handling these details (R. 97), and that the other directors completely acquiesced. In addition, the evidence shows clearly that the corporation was most informally and irregularly operated. Apparently, no resolutions of any kind were ever adopted on any subject (R. 99). The treasurer did not keep the books of account, none being kept until June or July of the year following incorporation and after defalcation by the president (R. 148). The secretary, who was related to the president, was inactive and was unable to do any work, relying on the others to do so, and, in fact, kept no records of any corporate meetings or transactions, and, in general, did not know what the corporation was doing (R. 141, 142).

While there was no formal resolution of the board of directors authorizing the president to sign, execute and deliver checks or other separate documents, the evidence clearly shows that the president did so with the knowledge and without the objection of the officers

and directors, and did so over a period of eight or nine months, which, in effect, nullified the by-laws and made them irrelevant. *Sferlazzo v. Oliphant,* 24 Cal. A. 81, 140 Pac. 289 (1914); *Schwehm v. Chelten Trust Co.,* 257 Pa. 76, 101 Atl. 93 (1917).

In *Produce Exch. Trust Co. v. Bieberbach,* 176 Mass. 577, 58 N.E. 162 (1900), an action was brought against a corporation on three promissory notes. The trial court excluded the by-laws of the company which required "checks or other instruments for the payment of money" to be signed by the president and countersigned by the treasurer. On appeal, the defendant contended that this ruling was erroneous. The court said:

> "* * * While the by-laws gave authority to certain officers, the corporation could also confer the power to issue its notes in other ways. As the plaintiff relied wholly upon the fact that the corporation had been accustomed to recognize and pay notes made like those in suit, it was immaterial that the by-laws provided that notes should be made in some other manner. The defendants were not harmed by the exclusion of this evidence. The existence of such a by-law could not affect the rights of the plaintiff as the holder of a note signed by the officers within the apparent scope of the power which the corporation held them out as having, by paying notes signed like those in suit." (58 N.E. 165).

The ruling was a correct one in any event, since the proffered exhibit did not constitute corporate by-laws under the law of the Territory of Hawaii. The examination of Yokono, the treasurer and one of the incor-

porators who was called upon to identify the document, as well as the testimony of Herbert K. H. Lee, attorney, draftsman and signatory of the Articles of Association, reveal the following facts with respect to the purported by-laws. After consultation with Yee who was described as the "prime mover" in the organization (R. 109), Attorney Lee drafted the Articles and by-laws, and turned them over to Yee (R. 109). An informal meeting without call was held, Anthony Yee, Fred Shintaku, Kay Pang and Takeshi Yokono being the only persons in attendance (R. 89). The Articles and by-laws were read and signed by those present (R. 89). This occurred on November 23, 1948 (R. 87). They were then returned to Lee who submitted the Articles for filing with the Territorial Treasurer (R. 110). Because of the failure to have five incorporators, as required by territorial law, the Treasurer returned the Articles to Lee who then signed them as the fifth incorporator and resubmitted them for filing on December 7, 1948, when the corporation came into existence (R. 110, 111, 113). The by-laws were never signed by Lee (R. 127). The original signed document offered in evidence was taken from the files of Lee, he being ignorant as to whether other signed copies were extant or where they might be (R. 127, 128, 129). The secretary of the corporation apparently never had a certified copy of the same in the corporate files available for the inspection of stockholders as required by territorial statute (R. 128, 129).

By Sec. 8335 *R.L.H.* 1945 (set out in Appellant's Brief as Appendix 1, p. 46), by-laws of a corporation

may be adopted at a meeting of stockholders duly called by the holders of not less than a majority of the voting stock outstanding. The section provides that the notice of the meeting shall state that a purpose of the meeting is to adopt by-laws. There is also a proviso in that section that "* * * by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association; * * *"

As a matter of common law, the power to adopt by-laws is a power basically of the stockholders and not of the officers or directors. *Fletcher on Corporations,* Permanent Ed., Sec. 4172; *Canairo v. Serrao,* 11 Haw. 22 (1897). This principle has, in fact, been incorporated into *Section 8335* which specifically and in detail sets up the procedural steps to be followed by stockholders in order to adopt, amend or repeal the by-laws. This is the essence of *Section 8335.* Only by a supplementary proviso are incorporators permitted to adopt by-laws for a corporation.

Because by-laws constitute the controlling internal law governing a corporation, its stockholders, directors and officers, the adoption of by-laws is not a casual procedure. The statutory requirements must be met. The evidence clearly shows that the formal procedure set out by statute was not followed by the stockholders or incorporators. The only action of the incorporators to adopt by-laws was taken at a meeting held some two weeks prior to incorporation. Absolutely nothing was done "at the time of" or subsequent to incorporation to validate this action. Only four of the five incorporators signatory to the articles

attended a meeting which was not formally called but was merely an informal get-together. Only at this meeting were the by-laws discussed, and only four of the five incorporators accepted them. The fifth, a dummy incorporator, at most "approved" them by "implication" (R. 111). No corporate record was kept of the incorporators' meeting (R. 142). As found by the trial court (R. 136), no action was subsequently taken by the incorporators, the directors or the stockholders to adopt this pre-incorporation action. No certified copy was kept by the corporation secretary as required by Section 8335. The general operation of the corporation was without regard to the by-laws and at all times in violation of their provisions. In any event, under the Hawaiian statute,[1] persons dealing with the corporation are not charged with constructive notice of the by-laws, and there is no contention or proof that appellee had actual notice of such by-laws.

It is, therefore, submitted that the ruling of the trial court was not in error and should be upheld by this court for the reasons, first, that there was no error in the ruling, and secondly, if there was error, such error was not prejudicial to the appellant.

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[1]Sec. 8335, Revised Laws of Hawaii 1945; Appellant's Brief, Appendix 1.

II. THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF TAKESHI YOKONO, THE TREASURER OF THE PAYEE CORPORATION.

Takeshi Yokono, treasurer of the payee corporation, took the stand as a witness of the appellant, who now claims that he was called merely to lay a foundation for the introduction of the corporate payee's by-laws (Appellant's Brief, p. 40). The purpose of calling this witness and the attempted introduction of the by-laws was obviously to prove the allegation contained in the appellant's pleading and the claims set forth in the opening statement that the president of the corporation was without authority to endorse and cash the checks made payable to the corporation (R. 16, 35, 36).

The trial court, during the course of cross-examination, permitted inquiry into the operation of the corporation insofar as the inquiries showed the authority permitted the president and the corporate approval of his acts. The appellant objected to this cross-examination as being beyond the scope of the direct examination, and, on being over-ruled by the trial court, claims error in the ruling.

It is stated by the appellant that the settled rule of the federal courts is that cross-examination is to be limited to matters embraced in the examination-in-chief only (Appellant's Brief, pp. 40, 41). However, the appellant has overlooked the equally important principle that it is within the discretionary power of the trial judge to allow exceptions to this rule. This rule was clearly stated by Chief Justice Gibson, the progenitor of the so-called federal rule in the case of

Ellmaker v. Buckley, 16 S&R 72, 77 (Pa. 1827), where he explains cross-examination to be subject to enlargement in the trial court's discretion, in the following language:

> "* * * and for myself, I would not without further consideration pronounce the exercise of the discretion, depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a subject of a bill of exceptions."

The discretionary power of the trial court to control the extent of cross-examination is recognized in various decisions of the Supreme Court.[2] The following language has been used in leading cases:

> "* * * Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. * * *" *Rea v. Missouri,* 17 Wall. 532, 21 L.ed. 707, 709 (1873).

> "* * * judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination in chief was applied and enforced; but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be re-

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[2]Wigmore points out the fallacy in limiting cross-examination on any theory that leading questions could be improperly used as urged by appellant. (Appellant's Brief, p. 44.)

Wigmore on Evidence (3rd Ed.) Sec. 1887, pp. 538, 539.

versed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue." *Wills v. Russell,* 100 U.S. 621, 625; 25 L.ed. 607, 608 (1880).

"Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10—the lot in controversy. Thereupon defendant's counsel cross-examined him at great length, against the objection of plaintiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination-in-chief. * * *" *Davis v. Coblens,* 174 U.S. 719, 726, 43 L.ed. 1147, 1150 (1898).

Recognition that the extent of cross-examination rests in the sound discretion of the trial court is reiterated in *Alford v. United States,* 282 U.S. 687, 75 L.ed. 624 (1930); *District of Columbia v. Clawans,* 300 U.S. 617, 81 L.ed. 843 (1936); *Glasser v. United States,* 315 U.S. 60, 86 L.ed. 680 (1941).

To evaluate properly the cases in which the so-called federal rule was applied to limit cross-examination to matters introduced in direct examination, consideration must be given to the manner in which the question arose in the appellate court. Where the trial

judge has refused to permit a requested extension of cross-examination, the appellate court has generally upheld the trial court by the application of the limiting rule because the judge had in his discretion in the exercise of that rule so limited the examination. Where, however, the trial judge has in his discretion permitted reasonable latitude in cross-examination, reversal is had only where it can be said that the judge abused his discretion, and the complaining party was prejudiced thereby.

Thus, this court in *Alpin v. United States,* 41 F. (2d) 495 (9th Cir. 1930), (Appellant's Brief, p. 41), upheld the District Court which had excluded certain questions asked on cross-examination. There was obviously no error committed by the trial court in so ruling, and this action was compatible with the principles of the Supreme Court decisions previously enunciated, even though only the limiting rule and not the discretionary rule was invoked.

Likewise, in *Chevillard v. United States,* 155 F. (2d) 929 (9th Cir. 1946), (Appellant's Brief, p. 41), the trial court had limited cross-examination and properly so. This court again upheld the trial court on the basis that the federal rule was sufficient to justify such a ruling.

Such being the applicable law, in order, therefore, for the trial court in the instant case to be reversed for error in its ruling, it is necessary for the appellant to show (1) that the cross-examination went beyond the scope of the direct examination; (2) that the trial court abused its discretion in permitting the

latitude of cross-examination; and (3) that the appellant was prejudiced by such ruling.

It is recognized that under the federal rule the right of cross-examination is not confined to specific questions of direct examinations but extends to the full scope of the subject matter of the examination-in-chief. Such has been held by this court in *Hyland v. Millers Nat. Ins. Co.,* 58 F. (2d) 1003, aff'd, 91 F. (2d) 735 (9th Cir. 1937), as well as by the courts in other circuits. *Union Trust Co. v. Woodrow Mfg. Co.,* 63 F. (2d) 602 (8th Cir. 1933); *Owl Creek Coal Co. v. Goleb,* 232 Fed. 445 (8th Cir. 1916); *DeWitt v. Skinner,* 232 Fed. 443 (8th Cir. 1916).

What was the scope of the direct examination of Takeshi Yokono? He testified that he was connected with the payee corporation during its existence from November 1948 to December 1949, and that it was a Hawaiian corporation of which he was one of the incorporators (R. 85). The witness identified the purported by-laws and his signature on them (R. 85-86). He testified as to the place of the signing and identified the other signatures (R. 86). After counsel stated that he would show by the testimony of the witness that the purported by-laws constituted the official record of the corporation, the witness testified as to the date of signature (R. 87) and that *they were "the By-Laws under which the corporation acted"* (R. 85-88). [Italics supplied.]

In other words, the corporation acted as though these were the by-laws. As stated by appellant:

> "* * * Appellant had further bolstered its argument that these were the authentic By-Laws by making reference to the fact that, even if not properly adopted, these By-Laws had been acted upon as if they were the By-Laws of Waipahu Auto Exchange, Limited. In doing so, *appellant was referring to the testimony of Takeshi Yokono that these were the By-Laws under which the corporation acted* (R. 88)." [Italics supplied.] (Appellant's Brief, pp. 30-31).

The obvious purpose of the introduction of the purported by-laws and the evidence that the corporation had acted as though these had been legally adopted was to show that the president of the payee corporation had no authority to endorse and cash checks on behalf of the corporation (R. 4, 16, 35, 36). The cross-examination was directed solely to the question of the authority of the president as conferred by the custom of the corporation and by the action or inaction of its officers and directors.

It is submitted that where a witness testifies that a certain document constitutes the by-laws under which the corporation acted, and those by-laws purport to limit the authority of the president, it is not beyond the scope of the direct examination to inquire on cross-examination as to the actual, implied or apparent authority of the president as granted by the actual operations of the corporation. Certainly, cross-examination showing that the purported by-laws were not, in fact, the "functional by-laws" of the company is within the scope of a direct examination in which

the witness testifies that they were, in fact, the functional or operative by-laws.

The extent of cross-examination is a matter largely within the discretion of the trial judge. The language of the Supreme Court in *Davis v. Coblens,* 174 U.S. 719, 726, 43 L.ed. 1147, 1150 (1898), previously referred to, may again be recited:

> "* * * The question of plaintiffs' counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination-in-chief. * * *"

In the instant case, the questions of plaintiff's counsel: "Were you connected with the Waipahu Auto Exchange, Limited, during its corporate existence?" (R. 85); "Were these the by-laws under which the corporation acted?" (R. 88) were general questions which similarly opened many things to particular inquiry. As such, it is submitted that the extent and manner of that inquiry was necessarily within the discretion of the court and no abuse of discretion can be found in the court's rulings.

III. THE TRIAL COURT'S FINDINGS THAT PAYMENT WAS MADE BY THE APPELLEE BANK TO AN AUTHORIZED OFFICER OF THE CORPORATE PAYEE SHOULD NOT BE SET ASIDE ON APPEAL.

That payment to an authorized agent of the payee is a complete defense to an action brought by a de-

positor against a bank on a check claimed to have been wrongfully paid is undisputed. 9 *C.J.S.*, Banks and Banking, Secs. 352, 353; 40 *Am. Jur.*, Payment, Sec. 24; Appellant's Brief, pp. 16, 18-23.

The trial court found from the evidence that the bank made payment to an authorized agent of the payee, and, in accordance with the principle of law stated above, rendered judgment for the defendant. Since there is no dispute as to the applicable rule of law, the only question presented is whether the court's findings of fact are so clearly erroneous within the meaning of Sec. 52(a) of the Federal Rules of Civil Procedure as to require a setting aside on appeal. The Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L.ed. 746, 765, 766 (1947), interpreted the provisions of Rule 52(a) as follows:

> "* * * That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that *the findings of the trial court, when dependent upon oral testimony where*

the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [Italics supplied.]

This court in *Smyth v. Barneson,* 181 F. (2d) 143 (9th Cir. 1950), has construed the rule to mean that if a trial judge's findings are based upon oral testimony *the appellate court "may disturb that finding only in the most unusual circumstances".*

It is submitted that the trial court's findings of fact to the effect that payment was made by the bank to an authorized officer of the payee corporation are amply supported by the evidence and should not be disturbed. The evidence supporting particular findings of the trial court will be considered separately in the discussion which follows:

A. The trial court correctly found that Anthony Yee, by virtue of the fact that he was president of the corporation, had prima facie authority to endorse negotiable instruments and to receive payment therefor.

It is an undisputed fact that Anthony Yee was president of Waipahu Auto Exchange, Limited, the corporation named as payee in the checks involved in this action. The trial court found "That by virtue of this office as president of Waipahu Auto Exchange, Limited, Anthony Yee had *prima facie* authority to endorse negotiable paper and receive payment therefor on behalf of said corporation" (R. 24).

The trial court was correct in reaching this conclusion. Although the cases are not in complete agreement, the weight of authority supports the view that the president of a corporation, solely by virtue of his office as president, has *prima facie* authority to endorse negotiable instruments and to receive payment therefor.

The law on this subject is clearly and succinctly stated in 2 *Fletcher, Cyc.,* Corps., Sec. 601, as follows:

> "* * * A few early decisions deny the power of the president to indorse negotiable paper, but the later decisions hold that there is implied authority, or at least a presumption of authority to indorse such paper, not only in case of presidents of banks, but also in case of the presidents of ordinary trading corporations, although no by-law or resolution is shown giving them such authority; accordingly, an innocent person taking such paper in due course may stand on the presumption that the officer indorsing the instrument had the authority to do so, until such presumption is rebutted by competent evidence, and some authorities go so far as to hold that the prima facie presumption that the president of a manufacturing or trading corporation is authorized to discount and transfer, in the course of its business, negotiable instruments payable to or held by the corporation, is conclusive in favor of a holder of the instrument in due course. * * *"

In *Schwehm v. Chelten Trust Co.,* 257 Pa. 76, 101 Atl. 93 (1917), the plaintiff drew a check on the defendant bank in the sum of $5,002 payable to the Federal Loan Society. The check, endorsed "Federal

Loan Society, H. W. Stoll, President, Jos. R. Friedman," was cashed and subsequently charged against the plaintiff's account. Plaintiff then brought suit against the defendant bank claiming that Stoll, the payee's president, had no authority to endorse the check. Under the by-laws of the Federal Loan Society the president was general manager of the company and had general supervision of the other officers.[3] However, it did not appear that the president had been given any specific authority in regard to financial transactions or signing or endorsing commercial paper. On appeal, the plaintiff contended that the power of the president was limited by a provision of the by-laws which required that all checks were to be signed by the treasurer and countersigned by the president. However, the court said that this provision referred only to instruments on which the corporation was maker and not to instruments where the corporation was payee and that, therefore, it did not limit the power of the president as to the latter. In holding that the president had authority to endorse the check in question and to receive payment therefor, the court said:

> "Under the by-laws, as noted above, the president was made the 'chief executive officer' and the general and active manager of the business of the company. He had control over every other officer of the company, and power to direct the disbursement of its funds. This authority was ample to authorize him to accept money paid to

[3]Attention is directed to the fact that under the purported by-laws of the payee corporation the president had general supervision over the business of the corportion and its officers. (R. 116).

> the company, whether in cash or in the form of a check payable to the order of the company. If he misappropriated funds paid in good faith to him as the representative of the company, the loss must be that of the corporation that authorized him to act, and held him out to the public as its chief officer and general agent. As the power was delegated to the president in the by-laws, there is no question here, as to acquiescence, by the board of directors. No action upon the part of the directors was necessary. But even where his authority comes from the directors, the president of a bank may indorse bills or notes payable to it. And it would seem that he has an implied power to indorse and transfer its negotiable paper. 1 Daniels, Neg. Inst. §394." (101 Atl. 94.)

Accordingly, the court held that "payment of the check to the president of the company was payment to the corporation."

See also *Cardwell v. Garrison,* 179 N.C. 476, 103 S.E. 3 (1920); *Sawyer v. Rochester Trust Co.,* 45 F. (2d) 867 (D.C., N.H. 1931); *Merrill v. Hurley,* 6 S.D. 592, 62 N. W. 958 (1895); *Citizens' State Bank v. Skeffington,* 50 N.D. 494, 196 N.W. 953 (1924); *Swedish-American Bank v. Koebernick,* 136 Wis. 473, 117 N.W. 1020 (1908); *California Standard Finance Corp. v. J. D. Millar R. Co.,* 118 Cal. App. 185, 5 P. (2d) 41 (1931); *Jones v. Stoddart,* 8 Idaho 210, 67 Pac. 650 (1902); *American Exchange Nat. Bank v. Oregon Pottery Co.,* 55 Fed. 265 (C.C., Ore. 1892); *Citizens' Nat. Bank of Tacoma v. Wintler,* 14 Wash. 558, 45 Pac. 38 (1896); *Weaver v. Henderson,* 206 Ala. 529, 91 So. 313 (1921).

In several cases the courts, while recognizing that a presumption of authority exists, have held that the rule does not apply where the president uses the funds obtained on his signature or endorsement for his own purposes. *Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co.,* 260 N.Y. 84, 183 N.E. 73 (1932); *Bank of Benson v. Gordon,* 103 Neb. 508, 172 N.W. 367 (1919). This distinction is not applicable to the case at bar for there is no evidence in the record that the president of the payee corporation used the funds he obtained from cashing the corporate checks for his own purposes. On the contrary, the complete acquiescence of the directors and stockholders to the president's control of the financial affairs of the corporation gives rise to the irresistible inference that Anthony Yee was, in fact, sharing the profits with the stockholders, or using the money for the benefit of the corporation.

Since there is no evidence in the record showing the use to which the proceeds were put or in any manner rebutting this presumption of authority on the part of the president of the payee corporation, the trial judge was required to infer that such authority actually existed, in accordance with the general rule as to presumptions. 20 *Am. Jur., Evidence,* Sec. 166; *Carey v. Hawaiian Lumber Mills Co., Ltd.,* 21 Haw. 506, 511 (1913); *State v. Northwestern Nat. Bank,* 219 Minn. 471, 18 N.W. (2d) 569, 580 (1945).

B. The trial court's finding that Anthony Yee had implied authority to endorse the checks and to receive payment therefor on behalf of the corporate payee is supported by substantial evidence and should be sustained.

(1) *Law of Implied Authority.* Counsel for appellant has accurately stated the law on implied authority as follows:

> "Implied authority is a form of actual authority implied from powers expressly given, or from the circumstances of the case. * * *" (Appellant's Brief, p. 330).

Appellee is in full agreement with this statement of the law but relies mainly upon that facet of the rule which finds an implication of authority *"from the circumstances of the case"*, rather than "from powers expressly given". Numerous cases have held that, although the president of a corporation may not be expressly authorized to execute or endorse negotiable instruments and to receive payment therefor, authority may be implied from a course of conduct, usage, or custom of the business. Implied authority may exist even though a by-law expressly denies such authority. And where the directors relinquish to the president the entire management and control over the corporation's business or financial affairs, authority to endorse negotiable instruments and to receive payment is readily implied. Many decisions may be found which are based on facts very similar to those of the case at bar.

In *Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co.,* 227 Pa. 235, 75 Atl. 1067 (1910), the president of a corporation delivered to the plaintiff

a promissory note for $3,000 which had been signed by him as president. He received in return a check from the plaintiff which he promptly cashed for his own purposes. When demand was made on the note, the corporation refused payment on the ground that its president had no authority to execute the note, and that the company had derived no benefit therefrom. The evidence showed that the company was a "one-man" affair, and that the president managed and controlled all of its business and finances, without instructions from or reference to the officers or stockholders. Neither stockholders nor directors held meetings except for the purpose of organization, and, once a year, to elect officers. The directors abandoned to the president all of their active duties. They did nothing to limit or define his powers, or to ascertain how he was managing the affairs of the company. It also appeared that it was customary for the president to mix the money of the corporation with his personal account.

The question presented on appeal was phrased by the court as follows:

> "* * * Where from its inception, the stockholders and directors of a corporation completely abandon to the president the entire management and control over its affairs, is the corporation liable on its promissory note given by the president without any express authority from the board of directors, or subsequent ratification where he uses the proceeds for his own purposes, and the corporation derives no benefit therefrom; and where the note is given to one paying full

value without any knowledge of a wrongful intention on the part of such president? * * *'' (75 Atl. 1067).

The court held in the affirmative, stating its decision as follows:

''* * * Where the stockholders and directors turn over to an officer the full and absolute management of all corporation affairs, and permit him to exercise unrestrained control for a long course of time without instructions from or reference to any other authority, prima facie the officer so intrusted may be taken to have power to do any act which the directors could authorize or ratify. In the recent case of First National Bank v. Colonial Hotel Company (not yet officially reported) 75 Atl. 412, it was held that a general and universal course of dealing by a corporation through a particular officer will give rise to an implied power to act and bind the corporation, and that such implied power will protect one so dealing with the corporation for the first time, even though such person had no previous knowledge of the manner in which the corporation was being conducted. In the present instance, the evidence as to the whole course of conduct of the officers and stockholders of the publishing company in allowing Singerly absolute control was sufficient to justify a finding that he was thereby vested with power to borrow money on the note of the company. If he had such authority he committed no wrong in its exercise, and if, after getting the money, he misappropriated it, the loss falls upon the publishing company, and not upon the trust company which

made the loan without the knowledge of any wicked intention on the part of Singerly. * * *'' (75 Atl. 1068, 1069).

It was held in *Fayette Nat. Bank v. Meyers,* 211 Ky. 185, 277 S.W. 292 (1925), that where it was established that it was customary for the president of a corporation, who was also its fiscal agent and general manager, to endorse all checks payable to the corporation and to deposit them to his individual credit, the corporation was bound by such endorsement. The court said:

> ''* * * Craft, as president and fiscal agent of the company, acting and speaking for it in every business relation, had a right to indorse the check of Meyers as fiscal agent of the company in the same way and manner he had indorsed all other checks of the company and the bank with which he had and kept an account, and which had been receiving other checks made to the company and indorsed by Craft as fiscal agent, had a right to accept the check in question, indorsed by Craft as fiscal agent, and to place the funds to the same account as with other checks, in accordance with the custom of business established between the oil company and the bank, as was done. * * *'' (277 S.W. 293).

In *Harris v. H. C. Talton Wholesale Grocery Co.,* 11 La. App. 331, 123 So. 480 (1929), a corporation was sued upon a promissory note which had been signed by the general manager under the corporation's stamp. The stock of the corporation was held by four shareholders who were also the directors of

the corporation. It was contended by the defendant that McCrary, the general manager, had no authority from the board of directors to execute the note. The evidence showed that as a matter of custom, habit, and practice, the board of directors, as such, took no stock or interest in conducting the affairs of the corporation. Only one meeting a year was held, and that for the purpose only of electing officers. Talton, as president, and McCrary, as general manager, the chief stockholders, were intrusted with the entire management of the concern. McCrary, as general manager, stayed in the office, did all the buying, conducted the business generally, employed the help with little if any advice or assistance from the others, signed notes evidencing the indebtedness of the corporation, and signed checks for and in its name. The board of directors was never called together to authorize or ratify any business transaction. Everything was left to Talton and McCrary. The court held that the corporation could not raise the defense that McCrary had no authority to execute the promissory note. It observed:

> "True, the board of directors did not by formal action authorize the making of the note by McCrary, the general manager. But it had intrusted the entire management of the concern to McCrary, who signed other notes and all checks for it without express authority, and none of his acts were ever repudiated or even questioned. By custom and practice, all similar matters were left in his hands. * * *
>
> "It is not always necessary that the acts of an officer of a corporation * * * be formally author-

> ized by its board of directors. An officer, such as the general manager, may lawfully bind a corporation where similar acts of his have been approved and sanctioned by the stockholers and members of the board as a general practice, custom, and policy. The authority of its officers often and frequently depends upon the course of dealings which the corporation or its directors have sanctioned. * * *'' (123 So. 482).

In *Sferlazzo v. Oliphant,* 24 Cal. A. 81, 140 Pac. 289 (1914), an action was brought upon a promissory note executed by the defendant to the corporation which note was endorsed as follows: "F. P. Cutting Company by F. P. Cutting, President." The evidence showed that F. P. Cutting was at the time of the endorsement the president and general manager of the F. P. Cutting Company. The plaintiff offered evidence to show the custom of the company regarding the endorsement of checks, notes and similar instruments during the three years that F. P. Cutting had been president of the company. Counsel for defendant objected on the ground that a by-law of the corporation required the president to obtain the approval of the directors before signing any instruments. The trial court sustained the objection. The appellate court reversed the trial court, stating the law as follows:

> "* * * we think the rule to be well settled that the president and general manager of a going business concern may, by the custom and usage of the corporation, be invested with power to do a variety of things necessary to be done

by some particular officer or agent in the usual and ordinary course of business. The indorsement and transfer of commercial paper and choses in action comes easily within the class of powers with which the president and general manager of a corporation may be shown to have been invested by proof of the usage of its business. [Authorities deleted]

"Nor do we think that the by-law urged here in opposition to the proof of such usage is to be construed as preventing the admission of such proof. Its language is permissive, not restrictive. It assumes to expressly authorize the president to sign all contracts and other instruments in writing which have been first approved by the board of directors; but the by-law does not indicate how that approval may be manifested; nor does it forbid the giving of larger powers in such matters to the active head of the concern. It is not, therefore, to be held to be a limitation upon the power of the directors of the corporation to invest its president and general manager with authority to do things of the kind in question in the ordinary and usual course of its business, and to signify their approval of his acts by the custom and usage of the corporation in the conduct of its affairs [Authorities deleted]; * * *" (140 Pac. 290).

To the same effect, see *Africa v. Duluth News-Tribune Co.,* 82 Minn. 283, 84 N.W. 1019 (1901); *G. V. B. Min. Co. v. First Nat. Bank,* 95 Fed. 23 (9th Cir. 1899) (discussed *infra); Morten v. Niagara Falls Paper Manuf'g Co.,* 122 N.Y. 165, 25 N.E. 303, 306 (1890).

(2) *The Evidence.* The trial court's finding that Anthony Yee, president of the corporate payee, had implied authority to endorse the checks and to receive payment therefor is supported by substantial evidence. The corporation, which existed only for a few months (R. 85), was loosely and defectively organized, and its affairs conducted in a most informal and irregular manner. Its four stockholders, who were also its directors and officers, included Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono (R. 104, 105, 107). Herbert K. H. Lee, the attorney who handled the incorporation of the company, was also named as a director (R. 104). The latter testified, however, that he was asked to be a "dummy director just for the purpose of compliance with the statute" (R. 111). Kay Y. K. Pang may also be characterized as a "dummy director" for she had no knowledge of what the corporation was doing (R. 142). Some time before incorporation, the stockholders assembled to adopt by-laws. No formal notice was given of this meeting (R. 89); it was merely an informal "get-together" called by Anthony Yee (R. 89). No minutes or records of any kind were kept of the meeting (R. 89). Evidently, no other meetings were held after this organizational meeting, for Herbert K. H. Lee, one of the directors, did not receive notice of any meetings (R. 131), and no minutes or records were kept of any meetings (R. 142). Although Yokono was the treasurer of the corporation, it is apparent from his confused testimony and lack of familiarity with the corporation's financial affairs

that he had abandoned his duties to someone else. Yokono did not receive a salary from the corporation, and devoted only a limited amount of time to his duties as treasurer for he had a full-time job managing a store (R. 139). In his own words, "I just went as I pleased" (R. 139). As treasurer, Yokono kept no regular books of account until after Anthony Yee had severed his connection with the company (R. 148, 149). The few records that were kept were so confusing that Yokono was unable to ascertain "which check belonged to which deal" (R. 157). Mrs. Kay Pang, a relative of Anthony Yee (R. 141), was secretary of the corporation, but was not active in any of its affairs (R. 141). She did not keep any records of any of the meetings or of any corporate transactions (R. 142). Since she had no knowledge of what the corporation was doing, and asked the other directors to perform her duties for the reason that she was not able to do the work (R. 142), she was, in fact, a "dummy secretary".

The evidence also shows that both Yokono and Yee were mixing the accounts of the corporation with their own individual accounts (R. 174, 177, 184, 186, 187). Yokono testified that at one time when the corporation was out of funds he and Yee decided to "help the company out by financing" (R. 177). The following testimony appears on page 177 of the record:

> "Q. [by Mr. Cades]. * * * You can state positively that the deposit of May 2, 1949, represented the deposit of a personal check of Anthony

Yee to the Corporation in the amount of $3,582.78; that is right, isn't it?

A. That represented part of my money and part of his money.

Q. Part of his money and part of yours?

A. Yes.

Q. But the check was a Yee check?

A. That's right."

The same witness testified that he drew his savings out of the bank and paid Territorial Motors for a debt of the corporation (R. 174).

The testimony of Yokono and Herbert K. H. Lee shows that Anthony Yee, the president of Waipahu Auto Exchange, Limited, exercised almost complete control of the corporation's financial affairs. Yokono testified that, as treasurer of the corporation, he gave his sanction to the financial arrangements undertaken by Yee (R. 97). He stated that Yee was giving the orders as to what the arrangements should be (R. 160), and that, as a matter of fact, financial matters were "left entirely to Mr. Yee" (R. 161). The following testimony with reference to the financial dealings of the corporation appears on pages 160 and 161 of the transcript of record:

"Q. [by Mr. Cades]. So that if Anthony Yee signed the letter and made the arrangements, he made them without your approval or knowledge?

A. It seems that way. [109]

Q. You testified that you knew that he had made some arrangements with finance companies; is that right?

A. Yes.

Q. Who was giving the orders on what the arrangements should be, you or Mr. Yee?

* * * * * * *

The Witness. You mean the arrangements for the loans?

Mr. Cades. Arrangements with the finance companies.

A. I don't recall, but it must have been—it must have been Yee.

* * * * * * *

Q. Mr. Yokono, weren't the arrangements concerning the relationship or the dealings of your Company with the finance companies left entirely to Mr. Yee?

A. Yes."

The corporation was for all practical purposes a "one man affair". As stated by Mr. Herbert Lee, the corporation's attorney, Yee was the "prime mover in this organization" (R. 109). It is apparent that the directors placed absolute trust and confidence in Yee and allowed him to exercise unrestrained management of the corporation's financial affairs. Clearly implied from these broad powers was the authority to endorse checks without countersignature of any other officer and to receive payment on behalf of the payee corporation.

When the directors of the payee corporation conferred upon Yee the authority to make the arrangements with finance companies (R. 160-161), they had ample opportunity and time to inform themselves as to what these transactions involved. In a small corporation, which is informally operated, a course of dealings

of an officer, entrusted with general authority, will create implied authority to continue in that course. A cursory inquiry by the directors would have disclosed that Yee was cashing the checks of the corporation on his sole endorsement. The directors knew or should have known of this course of dealing on the part of its president. Their failure to object constituted tacit approval of his conduct.

Over a period of four months the appellant issued fourteen checks to the payee corporation by delivering them to Anthony Yee as president (R. 19), who in every case cashed them on his own endorsement. Completely satisfied that Yee had full authority to act for the payee corporation, the appellant cashed one of these checks at its office and accepted as proper the endorsement of Yee alone (R. 71). Appellant deposited the check so endorsed to its account in the appellee bank (R. 70), knowing that the check had been issued for the financing of an automobile contract (Ex. 2-A, R. 77). The purpose of depositing the check so cashed by appellant was to have a record that payment had been made to the payee corporation (R. 73). It scarcely lies in the mouth of the appellant now to contend that Yee lacked authority, as president of the payee corporation, to endorse the checks and receive payment therefor, when appellant itself, in complete reliance upon the authority of Yee, cashed a similar check and deposited it, so endorsed, as its own record of a payment to the payee corporation.

The finding of implied authority is amply supported by the record and should not be disturbed.

C. The trial court correctly found that Anthony Yee had apparent authority to endorse the checks and to receive payment therefor on behalf of the corporate payee.

The trial court found "That the President, Anthony Yee, had apparent authority to endorse the checks in question and receive payment therefor an behalf of said corporation." (R. 24). It is submitted that this finding is based upon sound law and is amply supported by the evidence. The law of apparent authority, as applied to corporations, is clearly stated in 2 *Fletcher, Cyc., Corps.,* Secs. 449, 451, as follows:

> "A corporation is subject, to the same extent as a natural person, to the general principle that one who holds out another, or allows him to appear as having authority to act, as his agent with respect to his business generally, or with respect to a particular matter, cannot, as against persons dealing with him in good faith, deny that his apparent authority is real. If a corporation, therefore, or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real.
> * * *
> * * * * * * *
> "* * * apparent power may result from the corporation, having knowledge of the facts, habitually or for a long time or on numerous occasions, permitting an officer or agent to do an act ordinarily not within the powers of such an officer or agent. For instance, the treasurer of a corporation has no implied authority, as a general rule, to borrow money, or to make, accept or indorse

> notes or bills, or to sell or pledge notes or other securities or to sell other property, etc. But if the corporation allows him habitually to do so, and thus clothes him with apparent authority, it is bound thereby. And the same is true of any other officer whom the stockholders or directors, by allowing him to act for the corporation in a particular way, have clothed with an apparent authority which is beyond that usually implied from his office. Thus, payment of many similar notes executed and issued by the same officers shows apparent authority of such officers to execute like notes. * * *"

See also the general discussion in 2 *Am. Jur.*, Agency, Secs. 101, 102, 179.

The Hawaiian Supreme Court in *Caplan v. Hoffschlaeger and Stapenhorst,* 2 Haw. 691, 695 (1863), said:

> "* * * If a person is held out to the public by the principal as having a general authority to act for and to bind him in a particular business, it would be unsound in law as in morals, * * * to allow him to set up his own secret and private instructions to the agent, limiting that authority, and thus to defeat the transactions under the agency, where the party dealing with him could have no notice of such instructions. * * *"

It was held in *Platt v. Montclair Feed & Fuel Co.,* 9 N.J. Misc. 1319, 157 Atl. 553 (1931), that where the evidence showed in previous dealings between the parties negotiable paper had been endorsed in precisely the same manner by the president of a corporation,

the trial judge was justified in concluding that the president was clothed with apparent authority to make the endorsement.

The facts of *G. V. B. Min. Co. v. First Nat. Bank,* 95 Fed. 23 (9th Cir.), decided by this court as early as 1899, are analogous to the facts of the case at bar. In that case, an action was brought by a bank against a mining corporation to foreclose a mortgage for the sum of $6,500 evidenced by two promissory notes signed by G. V. Bryan, the president of the company. The corporation denied the existence of any indebtedness whatever, apparently on the theory that the president was not authorized to execute the mortgage and promissory notes. It appeared from the evidence that Bryan and Venable were owners of a group of mines and kept an account with the plaintiff bank in the name of "G. V. Bryan, Superintendent". In February, 1891, G. V. B. Mining Company was incorporated, Bryan and Venable receiving the bulk of the stock. A small number of shares was given to several other persons to qualify them to act as directors of the corporation. Only two meetings were held by the stockholders; both of these were called shortly after incorporation to comply with the formal requirements of adopting by-laws and electing officers. In spite of the incorporation, the business between the bank and the company was conducted in the same manner as before, Bryan and Venable transacting the business of the corporation as if they were the sole owners thereof. Part of the funds obtained upon the promissory notes given by Bryan as president was expended by Bryan

and Venable upon mines which they owned individually. In the introductory part of its opinion, the court said:

> "* * * The peculiar and irregular manner in which the business of the corporation, * * * was transacted, necessarily leads to many complications, * * *
>
> "Can appellant take any advantage of * * * any of the irregular acts of its officers? Can it, after allowing Bryan and Venable to pursue the course they did, holding them out to the world as qualified to transact the business in the manner stated, be allowed to deny their authority? * * *" (p. 28).

The court then pointed out that there is a distinction between a genuine, bona fide corporation, organized for the legitimate purpose of conducting a business which requires a combination of persons and of capital, to make the business successful, and a corporation organized and conducted, as this was, in the same manner and way as if no corporation, in fact, had been formed. It observed:

> "* * * We have said that Bryan and Venable constituted the corporation from the time of its organization up to, and at the time of, the execution of the notes and mortgage upon which this suit was brought, * * * In the light of the entire history of the corporation, * * * it might be, perhaps, more properly said that Bryan, until July 11, 1895, by the consent of all parties interested and concerned, and H. K. Thurber thereafter, were to all intents and purposes the G. V. B. Mining Company; that, as was said by the circuit

court, 'the so-called directors and officers in New York constituted simply the dumb machinery, entirely directed by these parties, and through whom they operated when it was necessary to invoke the legal status of the corporation to strengthen their hands or advance their objects.' " (p. 29).

The court held that Bryan, as president of the corporation, had full authority to incur the indebtedness and to execute the promissory notes in the name of the corporation. It stated its decision as follows:

"* * * Where the president of a corporation is given full power and authority to conduct and manage its business, and deal with the property and affairs of the corporation in such a manner, and for such a length of time, as to justify others with whom he transacts business in believing that he had authority to do the acts in the manner and way performed by him, the people with whom he transacts business have the right to deal with him upon the assumption that he has such authority; and the corporation, having knowledge of the exercise of such acts, and of the manner in which the corporate business was transacted, cannot thereafter, to the injury and prejudice of such parties, deny his authority, or disaffirm or set aside his acts. * * * [Authorities deleted]" (p. 30).

Appellant is in accord with the general principles of law stated above, but claims that the evidence does not show that "anyone connected with Waipahu Auto Exchange, Limited, held Anthony Yee out as having authority to cash corporate checks." (Appellant's Brief, p. 38). It is submittd that while a manifesta-

tion or "holding out" on the part of the corporation is usually required for the creation of apparent authority, this need not be in the form of a public announcement. It is sufficient if the directors of a corporation give the president such broad powers as to justify persons dealing with him to believe that he has been clothed with authority to act for the corporation. *Citizens' Bank v. Public Drug Co.,* 190 Iowa 983, 181 N.W. 274, 277 (1921).

An apparent agent is one who reasonably appears to third persons to be authorized to act as the agent of another. 2 *Am. Jur.,* Agency, Sec. 101; *Restatement,* Agency, Sec. 8. It is also sufficient if the directors permit the president of a corporation to perform a series of acts over a period of time without objecting to this course of conduct. 2 *Am. Jur.,* Agency, Sec. 102.

Appellant also insists that there is no evidence in the record showing that the corporate payee knew that its president was cashing the checks in question (Plff's. Brief, p. 38). The simple answer to this contention is that *actual* knowledge on the part of the directors of the corporation is not essential to the creation of apparent authority; it is enough if the directors, in the exercise of reasonable care, *should have known* what the agent was doing in the particular transaction. The law is clearly summarized in 2 *Am. Jur.,* Agency, Sec. 102, as follows:

> "* * * Apparent authority may also be, and often is, derived from a course of dealing or from the fact that a number of acts similar to the one in question were assented to, ratified, or not dis-

avowed by the principal. The acquiescence of the principal in an extension of his authority by an agent in the transaction in question may be sufficient to create the appearance of authority in the agent to do such act; *the acquiescence in, and consequent scope of, such authority, is to be determined not only by what the principal actually does know of the acts of the agent within the employment, but also as to what he should, in the exercise of ordinary care and prudence, know the agent is doing in the agency transaction.* In such case, the appearance of authority is created because of the fact that the third person is entitled to assume that the principal is cognizant of the exercise of authority and would forbid it if it were unauthorized. As stated by the American Law Institute, except for the execution of instruments under seal, or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. * * *'' [Italics supplied].

There is ample evidence in the record of circumstances creating apparent authority in Anthony Yee, president of the corporate payee. The action of the directors in conferring upon Anthony Yee the general authority to handle the financial arrangements for the corporation (R. 160, 161) was a manifestation to third parties that Yee had broad powers. In the exercise of these powers Yee assumed full control and manage-

ment of the corporation's financial affairs. No objection was made by the directors to this course of conduct on the part of Yee (R. 97, 160, 161). In a closely-held corporation which does a comparatively small volume of business, the directors are under a duty to keep the business and financial affairs of the corporation under reasonable surveillance. During a priod of four months, Anthony Yee cashed thirteen checks, each being made out to the corporate payee for a sum in excess of $1000. (Plff's. Exs. B-1-B-12; Deft. Ex. No. 2). Certainly, the directors, in the exercise of ordinary diligence, should have known what was happening to its revenue. The effect of their acquiescence in this course of conduct was to clothe the president with apparent or ostensible authority to continue in this course.

The appellant itself contributed materially towards clothing Anthony Yee in the shroud of apparent authority. Not only did it transfer possession of the checks in question to Yee, but it cashed one of these checks at its office (R. 71, Deft. Ex. No. 2) and then deposited the check so endorsed to its account in the appellee bank (R. 70). This action was a representation by the appellant to the appellee bank that Anthony Yee was authorized to endorse and cash similar checks issued by it.

The appellant finally contends that there is no evidence that the appellee bank either knew or relied upon any "holding out" by the corporation (Appellant's Brief, pp. 38, 39). It is submitted that the evidence clearly shows that the appellee bank knew that

Yee was endorsing and cashing the checks of the payee corporation over a period of several months (Plff's. Exs. B-1-B-12; Deft. Ex. No. 2). This practice on the part of Yee apparently met with no objection from the directors of the corporation, for dealings with the finance companies were "left entirely to Mr. Yee" (R. 97, 160, 161). From the very fact that the directors acquiesced in this course of conduct, the appellee bank was entitled to conclude that Anthony Yee was authorized to endorse and cash checks made out to the corporation. That the appellee bank relied upon this apparent authority is clear from its action in permitting Yee to withdraw the funds on his endorsement alone (Plff's. Exs. B-1-B-12).

Even if it be assumed, however, that the bank had no knowledge of the apparent authority in Yee, the bank is nevertheless entitled to the benefit of those facts which it would have discovered upon reasonable inquiry. *Buckley v. Lincoln Trust Co.,* 131 N.Y.S. 105 (1911); *Wilson v. Metropolitan Elev. R. Co.,* 120 N.Y. 145, 24 N.E. 384 (1890); *Hanover Nat. Bank v. American Dock & Trust Co.,* 148 N.Y. 612, 43 N.E. 72 (1896). Reasonable inquiry would have disclosed that Anthony Yee, as president of the corporation, had been entrusted by the directors with complete charge of the financial affairs of the corporation (R. 160, 161); these broad powers would have justified the inference that Yee had authority to endorse and cash the checks of the corporation.

The trial court properly found that Anthony Yee had apparent authority to endorse and cash the checks.

CONCLUSION.

For the reasons set forth above, the judgment of the District Court for the Territory of Hawaii should be affirmed.

Dated, Honolulu, T. H.,
January 31, 1951.

Respectfully submitted,
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